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COURT OF CRIMINAL APPEALS
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No. PD-0183-21

In the Court of Criminal Appeals of Texas

FILED
COURT OF CRIMINAL APPEALS
3/24/2021
DEANA WILLIAMSON, CLERK

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No. 14-20-00548-CR

In the Court of Appeals for the
Fourteenth District of Texas at Houston

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No. 2309523

In the County Criminal Court at Law No. 8 of Harris County, Texas

_____

THE STATE OF TEXAS

Appellant

V.

LEONARDO FABIO GARCIA

Appellee

_____

APPELLEE'S REPLY TO STATE'S PETITION FOR DISCRETIONARY REVIEW

Elaine Veatch Morley,
Attorney for Appellee
14019 SW FRWY Suite 301 #342
Sugarland, Texas 77478
Phone: 832-212-0438
Email: elainemorleylaw@gmail.com
SB# 00786308

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS OF TEXAS:

Comes now Appellee, Leonardo Fabio Garcia by and through his attorney and respectfully submits his reply to the State's Petition for Discretionary Review in Cause No 14-20-00548-CR.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Writ of Habeas was filed in the trial court on May 1st, 2020. Appellee's counsel wrote a short Writ petition and cited "Padilla." *Padilla v Kentucky, 559 U.S. 356 (2010).* On June 26th, 2020, in the evidentiary proceedings numerous cases were discussed. The Appellee testified and the Court heard arguments about the Affidavit of Appellee's 2007 counsel. At the close of the proceedings, conducted by zoom, the Court took to matter under advisement. On July 14th, 2020 the trial judge "discharged the Appellee without delay."

The State then appealed on July 30th, 2020 and the State jumped to conclusions as to the trial court's legal reasoning and created their own narrative of events. On appeal, the State asserted various arguments in support of their position that the Trial Court had abused his discretion in

vacating the judgment and discharging the Appellee on July 14th, 2020. [1] In the trial court proceedings, the State secured an affidavit from the Appellee's defense counsel in 2007. [2] The trial judge vacated the judgment and discharged the Appellee, he did not order a rehearing, nor issue findings of fact and conclusions of law. The State imputed to the trial judge assumptions as to the trial judge's reasoning. Despite all the spectacular arguing on appeal, this case should not have ever been appealed.

On appeal, the Fourteenth Court of Appeals published their Opinion in the matter of *State V. Garcia No. 14-200548-CR, 2021 WL 786746 (Tex. App___Houston [14th Dist.] March 2, 2021, pet filed).* The Fourteenth Court of Appeals dismissed the State's appeal for want of Jurisdiction. *Id. at 2.*

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[1] The State's appeal [See State's NOTICE OF APPEAL] Cause No. 2309523, the State based their grounds for appeal, stating as follows: " On July 14th, 2020, this Court granted the Defendant's application for Writ of habeas corpus and thereby vacated this Court's judgment of conviction and sentence in the defendant's underlying criminal case in contravention of controlling legal authority concerning the retroactive application of Padilla v Kentucky, 559 U.S. 356 (2010). Further, the State wrote " The State respectfully submits that this Court erred in granting the defendant's application for a writ of habeas corpus and in the giving the defendant the relief that he sought, that this court vacates its previous judgment of conviction and sentence in the defendant's underlying criminal case cause number 1413575.

[2] Ironically, the Affidavit of the court appointed Defense counsel Juan Aguire was secured by the State. The Affidavit contained numerous contradictions, including specifically that the Defense attorney wrote of giving"Padilla Admonishment" as if Padilla had existed in 2007.

On March 2, 2021, The Fourteenth [14th Dist.] Court correctly held that Article 44.01 of the Code of Criminal Procedure "does not authorize the State to appeal the grant of relief to an applicant for writ of habeas corpus filed pursuant to article 11.09 because the trial court's grant of relief to an applicant for writ of habeas corpus under article 11.09 cannot be fairly characterized as an unfavorable ruling from which the State would otherwise have the right to appeal the order. Specifically, the court held that the trial court's order does not authorize the State's appeal in this cause." *Id at 8*.

The State did not seek an En Banc decision from the Fourteenth Court of Appeal rather the State has filed for Discretionary Relief with this Court.

REASONS FOR REFUSING DISCRETIONARY REVIEW

The State relies upon Texas Rule of Appellate Procedure 66.3 (a), (b), (c) , (d) and (f) but not (e) for their reason for requesting Discretionary Review. However, the State has not actually addressed in a meaningful manner provisions (b), (c) and (d) and (f). Rather, in a "catch-all" fashion, the State's contentions are based upon (a) and are summarized in their one claim that the Fourteenth [14th Dist.] Court of Appeal's ruling is in

conflict with another opinion from another Court of appeals. The State is still relying upon *State V. Garcia, No. 13-11-00689-CR, 2012 WL 7849303, at *3-4(Tex. App.---Corpus Christi-Edinburg Dec. 13, 2012, no pet.)(,e,. Op., not designated for publication).*

Pursuant to Tex. R. App. P. 47.7(a), a Court is not bound by an unpublished opinion. The Fourteenth Court of Appeals Judges pointed this out in their opinion, nevertheless they addressed the issues of concern raised by the State. They distinguished the facts of the case in Appellee's case from the facts of the *State v Garcia,Id.* In the Appellee's case, specifically, the Court found that in the Appellee's case, the trial court's order did not make specific findings of fact, nor did the court's order serve as the "functional equivalent" of granting a new trial or a motion to "arrest the judgment." The Court found that in Appellee's case, the Court's order vacated the judgment and "discharged" Appellee. (Opinion No. 14-20-00548-CR pg. 7).

Article 11 of the Code of Criminal Procedure under 11.072 specifically requires (1)that a County Judge issue findings of fact and conclusions of law and (2)specifically provides for appeal pursuant too 44.01(k).Conversely, Article 11 of the Code of Criminal Procedure under 11.09 does not require findings of fact and conclusions of law to be written,

and it allows the Judge to “discharge.” and (3)Does not specifically provide for an appeal.

Black’s Law dictionary defines “discharge” as (1)any method by which a legal duty is extinguished, (3)the dismissal of a case, (4)the canceling or vacating a Court Order and (5)the release of a prisoner from confinement. Also according to Black’s Law Dictionary the word “vacate” means to nullify or cancel; make void; invalidate. *See* Black’s Law Dictionary 2006.

The Fourteenth (14th) Court of Appeals correctly decided that the right to appeal is conferred and defined by statute alone. (Marin v State, 851 S.W. 3d 275, 278 (Tex. Crim App. 1993). As the Court noted, ordinarily, a respondent in a habeas action, such as the State cannot appeal. See *Board of Pardons & Paroles ex rel. Keene v Ct of App. of Eight Disc., 910 S.W 2d 481, 483 (Tex. Crim. App. 1995) (Orig. proceeding); In re Tex. Bd. of Pardons & Parolees, 495 S.W. 3d, 554, 558 (Tex. App. Houston [14th Dist.] 2016, (Orig. proceeding).*

Habeas Corpus, provisions of law in Texas are found in Chapter 11 of the Code of Criminal Procedure as follows: -

Art. 11.02 specifically requires that the writ must run in the name of the "State of Texas," and that it be addressed to a person having another under restraint, or in his custody. Art 11.03 states that the writ is not invalid, nor shall it be disobeyed for any want of form if it "substantially appear" [exact wording] that it is issued by a competent authority and the writ “sufficiently show” [exact wording] the object of its issuance. Art-11.05 -The

Court of Criminal Appeals, the District Courts, the County Courts, or any Judge of said courts, has power to issue the writ of habeas corpus, and is the duty upon proper motion to grant the writ under the rules prescribed by law.

The Code of Criminal Procedure, Chapter 11 Art. 11.072 Sec. 2 provides -

(a) An application for a writ of habeas corpus under this article must be filed with the clerk of the court in which community supervision was imposed. (b) At the time the application is filed, the applicant must be, or have been, on community supervision, and the application must challenge the legal validity of: (1) the conviction for which or order in which community supervision was imposed; or (2) the conditions of community supervision. Chapter 11 Art. 11.072 Sec. 7 provides that, (a)... ***if entitled to relief...the court shall enter a written order including findings of fact and conclusions of law***. Sec. 8 states that if the application is denied in whole or part, the applicant may appeal under Article 44.02 and Rule 31, Texas Rules of Appellate Procedure. If the application is granted in whole or part, ***the state may appeal under Article 44.01 and Rule 31, Texas Rules of Appellate Procedure.***

12. In contrast, the Code of Criminal Procedure, Art. 11.09 provides as follows-

If a person is confined on a charge of misdemeanor, he may apply to the county judge of the county in which the misdemeanor [was] charged to have been committed." Art. 11.15. states that the writ of habeas corpus shall be granted without delay by the judge or court receiving the petition unless it be manifest from the petition itself, or some documents annexed to it, that the party is entitled to no relief whatsoever. Art. 11.40. states that the judge or court before whom a person is brought by writ of habeas corpus shall examine the writ and the papers attached to it; **and if no legal cause be shown for the imprisonment or restraint, *or if it appears that the imprisonment or restraint, though at first legal, cannot for any cause be lawfully prolonged, the applicant shall be discharged.*** Article 11.48 states that it shall not be necessary on the trial of any cause arising

under habeas corpus to make up a written issues, though it may be done by the Applicant for the writ.

Specifically, with ineffective assistance of counsel issues, the State cites, *Ex Parte Overton, 444 S,W, 3d 632,641 (Tex. Crim. App. 2014)* but this case addresses an 11.07 writ case, and they cite *Ex Parte Bryant, 448 S.W. 3d, 458, 470 (Tex. Crim. App. 2005)*, a capital murder case. They cite *Ex Parte Briggs, 187 S.W.3d 458,470 (Tex. Crim App. 2005)* having to do with a felony of injury to child ineffective assistance of counsel and findings of fact and conclusions of law. In *Ex Parte Moody, 991 S.W. 2d. 856, 859 (Tex. Crim. App. 1999)*, is also a case under 11.07, and Ex Parte Wilson 724 S.W. 2d 72, 74-75 (Tex. Crim. App 1987) also having to do with an 11.07 matter. In *Alvarez v eight Court of Appeals of Texas, 977 S.W.2d 590 (Tex. Crim. App.* 1998), the relief sought by the State was dismissal of the complaints charging offenses in municipal court, and *State V. Chen 65 S.W. 3d 376, 379 (Tex. App. Houston [14th Dist.] 2020, np. pet.*) where the Court affirmed the trial court's order holding that a statute was facially unconstitutional and dismissing the information and habeas-corpus judgment discharging the appellee. The state also references *Ex Parte Crenshaw, 25 S.W. 3d 761, 764 [Tex. App Houston [1st Dist], pet ref*d)* a case dealing with double jeopardy and specifically 44.01(a(4) and *State v Kanapa, 778 S.W 2d 592, 593-94 (Tex. App--Houston [1st Dist] 1989, no*

pet. dealing with Article 44.01(a)(2) and 44.01 (b) which held that the trial court modified the previous judgment in a case where the appellant served a probated sentence for six months and was discharged from probation and this case makes no mention of Art. 11.09.

In these matters the trial court was not required to do so, nor did the trial court make written findings of fact nor did Appellee submit them. The trial court "vacated the Judgment and discharged" the Appellee. Now the State argues that with respect to jurisdictional issues, that the Fourteenth Court of Appeals erred and misconstrued the "discharge" language of the trial court's order to mean "dismissal." They argue that the only appropriate relief was to remand for a new trial. Alternatively, they now argue that if the Court's order "discharging" the Appellee, is a "dismissal" then the trial court dismissed the information, which entitled the State to appeal. Either way the State wants to appeal once again based upon assumptions and speculation as to the trial court's reasoning.

The trial court acted within his authority. Art 11.40 states that - and if no legal cause be shown for the imprisonment or restraint, *or if it appears that the imprisonment or restraint, though at first legal, cannot for any cause be lawfully prolonged, the applicant shall be discharged.*

Finally, the Fourteenth Court of Appeals held correctly and furthermore as the Court of Appeals recognized, the term" confinement" in Article 11.09 does not require actual current confinement and that the county courts have habeas jurisdiction if a person is merely restrained due to the conviction. *Ex Parte Schmidt, 109 S.W 3rd 480, 482-83 (Tex Crim. App. 2003).* The Court also recognized that pending deportation based solely on an immigrant's misdemeanor conviction is confinement. Phong Anh Thi Le V State, 300 S.W.3d. 324, 326 (Tex App., Houston [14th Dist.] 2009, no pet.).

CONCLUSION

In summary, the trial court's grant of relief to the Appellee for writ of habeas corpus under 11.09 in this case cannot be fairly characterized as an unfavorable ruling upon which the State has the right to appeal. The Petition for Discretionary Review should be refused.

Respectfully Submitted,

/S/ Elaine Veatch Morley
Counsel for Appellee, Leonardo Fabio Garcia
14019 Sw Freeway Suite 301 #342
Sugarland, Texas 77478
Phone: 832-212-0438
Email: elainemorleylaw@gmail.com
SBN -00786308

CERTIFICATE OF SERVICE

I CERTIFY THAT ON MARCH 23, 2021, I PROVIDED A TRUE AND CORRECT COPY OF THE FOREGOING REPLY TO STATE'S PETITION FOR DISCRETIONARY REVIEW TO THE APPELLANT'S COUNSEL MELISSA H STRYKER AT THE FOLLOWING EMAIL ADDRESS stryker_melissa@dao.hctx.net.

Respectfully Submitted,

/S/ Elaine Veatch Morley
Counsel for Appellee, Leonardo Fabio Garcia
14019 SW Freeway Suite 301 #342
Sugarland, Texas 77478
SBN -00786308
Phone: 832-212-0438
Email: elainemorleylaw@gmail.com

CERTIFICATE OF COMPLIANCE

Pursuant to the Texas Rules of Appellate Procedure 9.4(i) the undersigned attorney certifies that there are 2340 words in the foregoing computer generated document, based upon the representation provided by microsoft word the word processing program that was used the create the document exposing the portions of the document exempted by Rule 9.4(i)(1).

Respectfully Submitted,

/S/ Elaine Veatch Morley
Counsel for Appellee
14019 SW Freeway Suite 301 #342
Sugarland, Texas 77478
SBN -00786308
Phone: 832-212-0438
Email: elainemorleylaw@gmail.com